Supreme Court, U.S.
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No. 98-699

In The

Supreme Court of the United States

October Term, 1998

JOSEPH E. BOYETT,

Petitioner,

vs.

TROY STATE UNIVERSITY MONTGOMERY (TSUM); DR. JACK HAWKINS, JR., individually and as Chancellor of the Troy State University System; DR. GLENDA McGAHA-CURRY, individually and as president of TSUM; DR. LIVINGSTON ALEXANDER, individually and as Vice President for Academic Affairs of TSUM; DR. MATTHEW MARIANO, individually and as Interim Dean of Computer & Information Science and Mathematics Division,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Accurately phrased in light of the record, the questions presented are as follows:

1. Whether Petitioner's statements within the University budget process seeking more money for his academic division addressed a matter of public concern as required by *Connick v. Myers*, 461 U.S. 138 (1983).

2. Whether Petitioner's internal University grievance concerning a Graduate Council run-off election and asserted through a right to petition claim was subject to the *Connick* standard.

3. Whether Petitioner as a nontenured probationary employee had a constitutional right to a hearing on his nonrenewal.[1]

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1. Respondents submit that the questions phrased by Petitioner are deficient because Question No. 1 fails to include the fact that the statements were in the context of the University's internal budget process, Question No. 2 erroneously states the issue in terms of conditions on the right to petition, and Question No. 3 erroneously assumes Petitioner had "a property right."

PARTIES TO THE PROCEEDINGS

Respondents agree with Petitioner that all parties to this petition are named in the caption of the case. Troy State University Montgomery (TSUM or the University) is part of the Troy State University System, which is a public entity of the State of Alabama.

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STATEMENT OF THE CASE

TSUM takes no exception to Petitioner's Statement of the Case, but the implication in the petition that there was no legitimate reason for the nonrenewal of this nontenured probationary employee should be compared with the Court of Appeals' observation that "[b]y many accounts he had a stormy sojourn at TSUM, especially during a period in which he served as dean of the [CIS] Division" and "was particularly adept at rubbing his superiors the wrong way," being described as "impossible to work with" and "belligerent and loud, argumentative, especially when there is a hidden agenda.' " App. 2a.[2]

REASONS FOR DENYING THE WRIT

This is another in the long line of efforts by nontenured probationary faculty to challenge their nonrenewal by constitutional claims based on 42 U.S.C. § 1983.[3] *E.g.*, *Lovelace v. Southeastern Massachusetts University*, 793 F.2d 419, 426 (1st Cir. 1986) ("The first amendment does not require that each nontenured professor be made a sovereign unto himself.").[4] The District Court's ruling on the § 1983 claims has been reviewed and affirmed by the Court of Appeals for the Eleventh Circuit, with a petition for rehearing *en banc* being denied. App. 1a, 7a, and 30a. Nothing warrants further review by the Supreme Court.

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2. References are to the Appendix in the petition.

3. Boyett had a full trial on his claim based on the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, with the jury returning its verdict against him. No appeal was taken from that result.

4. Then Circuit Judge Breyer was on the panel.

I.

THE COURT OF APPEALS' DECISION ON THE SPEECH CLAIM IS IN CONFORMITY WITH SETTLED LAW.

Relying on *Connick v. Myers*, 461 U.S. 138 (1983), the courts below held that Boyett failed to satisfy the threshold prerequisite of speaking on a matter of public concern. App. 3a, 19a-29a. With *Connick's* public concern prerequisite having been recently reiterated,[5] he could not ask the Court to abandon or limit it. He instead asks the Court to sit as a third layer canvasser of the record and to reach the opposite result from the courts below, but "we 'do not grant a certiorari to review evidence and discuss specific facts.' " *Superintendent v. Hill*, 472 U.S. 445, 460-461 (1985) (concurring/dissenting opinion).

A. It concerned only his division's share of the University's budget:

He attempts to equate his speaking to the proposition in *Pickering* that "the question whether a school system requires additional funds is a matter of legitimate public concern,"[6] which is indisputably so and equally irrelevant to the situation here concerning the internal allocation of the University's budget among its academic divisions.

The academic divisions are (a) Arts & Sciences, (b) Business, (c) Counseling, Education, and Psychology,

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5. *Waters v. Churchill*, 511 U.S. 661, 668 (1994) ("the speech must be on a matter of public concern . . ."); *United States v. National Treasury Employees Union*, 513 U.S. 454 (1996) (quoting *Connick's* demarcation between speaking as a citizen and speaking as an employee.).

6. *Pickering v. Board of Education*, 391 U.S. 563, 571-572 (1968).

(d) Distance Learning, and (e) Computer Information Sciences/ Mathematics (the "CIS division."). He was dean of the CIS division until he resigned in September 1995. The procedure for dividing the University's "very limited funding" among the academic divisions consists of (a) presentation of requests by each dean, (b) ranking of the requests by the Council of Deans, and (c) presentation of the Council of Deans' proposals to the University's budget committee. The speaking in question is described in the allegation of the complaint that he "regularly attempted to obtain additional funding and grants for the Division of Computer and Information Sciences and Mathematics. . . ." His testimony was that in doing so "I used the existing process" and spoke only within the University.

There is nothing remarkable about the holdings of the courts below that he was speaking in his role as an employee rather than in his role as a citizen. *Connick*, 461 U.S. at 147.

B. Comparison with *Connick*:

A comparison of this case with *Connick* confirms that the right result has been reached. It held that "with but one exception, the questions posed by Myers to her co-workers do not fall under the rubric of matters of 'public concern.' " 461 U.S. at 148. The single exception was "Do you ever feel pressured to work in political campaigns on behalf of office supported candidates?" (Question No. 11), which has no arguable counterpart in this case. The 13 subjects which were not of public concern included questions coming closer to the public concern threshold (but without satisfying it) than Boyett's lobbying within the University's budget process for a bigger slice of a thin pie for his academic division.[7] With those

7. Examples are (a) whether a rumor mill was affecting the working performance of Assistant District Attorneys, (b) whether they had confidence and trust in superiors, and (c) whether a grievance committee would be worthwhile for the office. 461 U.S. at 155-156.

subjects in *Connick* not being matters of public concern, the courts below were entirely right in holding that Boyett's quest for more money from the University's budget failed to satisfy the *Connick* public concern standard.

So also, the Court of Appeals was right in saying that "Boyett's speech resembles more closely the sort of complaints about internal administrative matters that courts have found not to be of public concern." App. 3a. *Connick*, 461 U.S. at 149 ("the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs."). It is particularly compelling in cases coming from universities with their well-known tradition of campus in-fighting. *Bunger v. University of Oklahoma Board of Regents*, 95 F.3d 987, 992 (10th Cir. 1996) ("Although many an academic donnybrook has been fought over such administrative rules, the issues at stake rarely transcend the internal workings of the university to affect the political or social life of the community.").[8]

He argues it is not important that he spoke only within the University, but he can derive no comfort from *Givhan*[9] since it had nothing to do with the public concern prerequisite. In the context of the public concern standard, the fact he spoke only internally was among the circumstances properly considered. *Connick*, 461 U.S. at 148 ("Myers did not seek to inform the public that the District Attorney's Office was not discharging

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8. *See also Colburn v. Trustees of Indiana University*, 973 F.2d 581, 586-587 (7th Cir. 1992) ("the Sociology Department's deterioration was principally of importance to the few faculty members who had to tolerate the bickering.").

9. *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979).

its governmental responsibilities in the investigation and prosecution of criminal cases.").[10]

He argues that being motivated "by his personal feelings" in seeking more money for his division is of no moment. That is immaterial argument since neither the District Court nor the Court of Appeals relied on his personal motivations. Even if it were otherwise, it would certainly be permissible to consider the extent to which he was motivated by empire-building within the University. *Connick*, 461 U.S. at 148 ("We view the questions . . . [held not to be matters of public concern] as mere extensions of Myers' dispute over her transfer to another section of the criminal court.").

His final argument is that he was "a divisional spokesperson advocating his colleagues' views on the amount of funding needed for that division," but that hardly elevates it to a public concern. *Connick's* public concern requirement would be reduced to a nullity if it could be avoided by the expedient of allegedly acting as a "spokesperson" for co-workers. *Colburn v. Trustees of Indiana University*, 973 F.2d 581, 587 (7th Cir. 1992) (rejecting plaintiffs' reliance on the theory they were speaking for "everyone in the department's interest.").

II.

HIS ARGUMENT FOR A DIFFERENT STANDARD FOR GRIEVANCES DOES NOT WARRANT SUPREME COURT REVIEW.

Boyett's grievance concerned the procedure for a run-off election for the Graduate Council, which "represents the faculty,

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10. In contrast is *United States v. National Treasury Employees Union*, 513 U.S. 454 (1996) ("the speeches and articles . . . were made outside the workplace. . . .").

the graduate faculty, in approving all changes to the graduates' curriculum." The position he espoused was adopted. It would be futile to continue to argue that the procedure followed in a single run-off election for an internal faculty committee was a public concern. App. 25a. *Bunger*, 95 F.3d at 992 ("The question of whether an administrative council in a university is limited to tenured faculty or opened to untenured faculty is a matter of internal structure and governance."). He therefore asks the Court to carve out a different standard for right to petition claims, resulting in any and all grievances by public employees "plant[ing] the seed of a constitutional case." *Connick*, 461 U.S. at 149.

A. The premise of the argument is contrary to this Court's precedents:

The premise of the argument — that the right to petition should stand on a higher plane than other First Amendment rights — could not be more at odds with this Court's precedents.

The Court has said that "[a]lthough the right to petition and the right to free speech are separate guarantees, they are related and generally subject to the same constitutional analysis." *Wayte v. United States*, 470 U.S. 598, 610 n.11 (1985). It has said that

> [t]o accept petitioner's claim of absolute immunity would elevate the Petition Clause to special First Amendment status. . . . These First Amendment rights are inseparable [citation omitted], and there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions.

McDonald v. Smith, 472 U.S. 479, 485 (1985).

How then can he say *DeJonge v. Oregon*, 299 U.S. 353 (1937) implicitly noted that the right to petition the government for redress of grievances is a fundamental right separate and distinct from the rights of free speech and free press, or the right to peaceable assembly? He reasons (a) the Court said the rights of speech and press and peaceable assembly are cognate but (b) did not say anything (one way or another) about the right to petition so (c) ergo, the Court must have meant the right to petition is "separate and distinct." That logic would have been specious in 1937. In light of the Court's decisions since then in *Wayte* and *McDonald*, it is beyond illogical today. *Belk v. Town of Minocqua*, 858 F.2d 1258, 1262 (7th Cir. 1988) ("as *McDonald* suggests . . . such special treatment of the right to petition would unjustly favor those who through foresight or mere fortuity present their speech as a grievance rather than in some other form.").

The contention that the public concern standard can be avoided by traveling on the petition clause is as well at odds with *Connick*, for the Court said that Myers' "survey, in our view, is most accurately characterized as an employee grievance concerning internal office policy" and that the First Amendment "does not require a grant [to public employees] of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State." 461 U.S. at 147, 154. Moreover, *Connick's* bedrock — "our longstanding recognition that the First Amendment's primary aim is the full protection of speech upon issues of public concern, as well as the practical realities involved in the administration of a government office"[11] — applies equally to all speech in the workplace regardless of whether it is expressed verbally or through grievances. *Day v. South Park Independent School District*, 768 F.2d 696, 701 (5th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986) (the contention

11. 461 U.S. at 154.

"assumes that when a government employer deals with its own employees, the protection afforded by the petition clause is entirely discrete from and broader than the shield afforded by the other clauses of the first amendment, a premise that is undermined by the Supreme Court's repeated references to these clauses as being overlapping.").

B. All but one of the Circuits considering the contention have rejected it:

The argument that the right to petition enjoys absolute protection is rested solely on *San Filippo v. Bonglovanni*, 30 F.3d 424 (3rd Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995), but that is a minority of one. Every other Circuit which has considered the question has rejected the argument, with most of them relying on *Connick*, *Wayte*, or *McDonald*. *E.g.*, *Belk*, 858 F.2d at 1261 ("Were we to adopt [plaintiff's] position that the right to petition is absolute, we would be guilty of implementing precisely the sort of hierarchy of first amendment rights forbidden by *McDonald*.").

Second Circuit: *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1059 (2nd Cir. 1993) ("The First Amendment right to petition . . . is 'generally subject to the same constitutional analysis' [*Wayte*] as the right to free speech.").[12]

Fourth Circuit: *Thorne v. Bailey*, 846 F.2d 241, 244 (4th Cir. 1988) ("*McDonald* clearly states that the Petition Clause does not enjoy a special status among the First Amendment guarantees . . . we reject Thorne's argument that the Petition

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12. *See also McEvoy v. Spencer*, 124 F.3d 92, 97 n.1 (2nd Cir. 1997) ("Because the right to petition and the right to free speech 'are related and generally subject to the same constitutional analysis' [*Wayte*], we will not discuss separately McEvoy's right to petition claim.").

Clause enjoys a 'preferred place' among First Amendment freedoms.").

Fifth Circuit: *Rathjen v. Litchfield*, 878 F.2d 836, 842 (5th Cir. 1989) ("The law [*Connick*] is no different where the act which allegedly gave rise to the retaliation claim is the filing of a grievance or a lawsuit.").[13]

Sixth Circuit: *Valot v. Southeast Local School District Board of Education*, 107 F.3d 1220, 1226 (6th Cir. 1997), *cert. denied*, 522 U.S. __, 118 S. Ct. 164, 139 L. Ed. 2d 108 (1997) ("A cause of action for violation of the Petition Clause is subject to the same analysis applied to a claim arising under the Speech Clause. . . . Specifically, the right to petition is limited to matters of public concern.").

Seventh Circuit: *Lashbrook v. Oerkfitz*, 65 F.3d 1339, 1349 (7th Cir. 1995) ("In order to state a claim for retaliation for exercising first amendment rights by petitioning the government for redress of grievances, a plaintiff must allege that the petition touched upon matters of public concern.").[14]

Eighth Circuit: *Hoffmann v. Mayor, Councilmen, and Citizens of Liberty*, 905 F.2d 229, 233 (8th Cir. 1990) ("the petition clause provides no lesser or greater guarantee of free expression than the speech clause . . .").

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13. *See also Day*, 768 F.2d at 701.

14. *See also Gray v. Locke*, 885 F.2d 399, 412 (7th Cir. 1989) ("in deciding whether a public employer has wrongfully deprived an employee of his right to petition the government, our inquiry must begin with whether the petition touched upon a matter of public concern by looking at the content, form, and context of the petition."); *Belk*, 858 F.2d at 1261-1262.

Ninth Circuit: *Rendish v. City of Tacoma*, 123 F.3d 1216, 1220 (9th Cir. 1997), *cert. denied*, 524 U.S. __, 118 S. Ct. 2368, 141 L. Ed. 2d 737 (1998) ("We now hold that a public employee's litigation must involve a matter of public concern in order to be protected by either the Petition Clause or the Speech Clause of the First Amendment."); *Gearhart v. Thorne*, 768 F.2d 1072, 1073 (9th Cir. 1985) (plaintiff's "grievances related only to . . . 'matters only of personal interest' [*Connick*], and do not invoke first amendment protection.").

Tenth Circuit: *Schalik v. Gallemore*, 906 F.2d 491, 498 (10th Cir. 1990) (plaintiff's "right to petition is inseparable from her right to speak. As such, we see no reason to subject this claim to a different sort of analysis.").

Eleventh Circuit: *Grigley v. City of Atlanta*, 136 F.3d 752, 754-755 (11th Cir. 1998) (rejecting the contention as contrary to *McDonald* and *Connick*).[15]

The "Circuit split" is thus minimal, as the Third Circuit stands alone. Boyett says it is "arguably supported by the Ninth and Tenth Circuits," but it is not even arguable. The cases he cites are not at all on point.[16] Both the Ninth and Tenth Circuits

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15. *See also Renfroe v. Kirkpatrick*, 722 F.2d 714, 715 (11th Cir. 1984), *cert. denied*, 469 U.S. 823 (1984) ("It is now clear that plaintiff's grievance is protected under the First Amendment only if it related to a matter of public concern.").

16. *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989) said only that "[t]he right of access to the courts is subsumed under the first amendment right to petition the government for redress of grievances," with no argument concerning the public concern standard; *Morfin v. Albuquerque Public Schools*, 906 F.2d 1434, 1437-1439 (10th Cir. 1990) concerned the right of labor union association and reiterated the *Connick* principle that "[p]ublic employees may not be retaliated (Cont'd)

are squarely in the majority camp in their holdings directly on point.[17]

C. This is not an appropriate vehicle for consideration of the Third Circuit's position:

With the continuing rejection of its view by every other Circuit which has considered it, the minor rift may well resolve itself by the Third Circuit joining the rest of the Circuits. If not, that would be the appropriate time for this Court to consider the question with the benefit of the Third Circuit's explanation of the reasons for adherence to such a solitary position.

In contrast, this case would be a most inappropriate vehicle. Because the Eleventh Circuit is with the majority, the idea that the right to petition is "more equal" than the right to speech was asserted for the first time in Boyett's petition for *en banc* rehearing, which was denied without opinion. App. 30a. There accordingly is no expression of views by the District Court or the Court of Appeals on the subject. So also, since the Third Circuit's position is at odds with this Court's principle that "there is no sound basis for granting greater constitutional protection to statements made in a petition,"[18] the question, if it is to be reviewed, should be evaluated in a case from that Circuit rather than in this case from a Circuit in alignment with this Court's pronouncement on the subject.

(Cont'd)
against for 'speech on a matter of public concern,' i.e., 'political, social, or other concern to the community.' "

17. The Ninth Circuit in *Rendish*, 123 F.3d at 1220, and *Gearhart*, 768 F.2d at 1073, and the Tenth Circuit in *Schalik*, 906 F.2d at 498.

18. *McDonald*, 472 U.S. at 485.

III.

HIS DUE PROCESS CLAIM WAS CONTRARY TO PRECEDENT.

Boyett's final claim required him to show he had a property interest in continued employment. *Board of Regents v. Roth*, 408 U.S. 564, 578 (1972).[19] It is a virtually verbatim repetition of the claim asserted by the nontenured college professor in *Roth*, 408 U.S. at 569 ("The only question presented to us at this stage in the case is whether the respondent had a constitutional right to a statement of reasons [for nonrenewal] and a hearing on the University's decision not to rehire him for another year. We hold that he did not."). Here, as in *Roth*, Boyett has no due process claim because he

> surely had an abstract concern in being rehired, but he did not have a *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.

408 U.S. at 578.

He argues for a different result by saying "the creation of a 'for cause' standard for termination gives rise to federally mandated rights to procedural due process," but that is a non-existent distinction because there is no " 'for cause' standard" in the case of a nontenured probationary employee. On the contrary, the Faculty Handbook provides that with nontenured faculty, "a severance prerogative rests with both parties."[20] That

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19. The requirement of "a constitutionally protected 'property' interest" was again stated in *Gilbert v. Homar*, 520 U.S. 924 (1997), where a property interest was established by the plaintiff having tenure.

20. The applicable provision of the Faculty Handbook is as follows:

(Cont'd)

is emphasized by the fact that "a claim of entitlement must be decided by reference to state law," *Bishop v. Wood*, 426 U.S. 341, 344 (1976), and "Alabama law requires no justification or reason for not renewing the contract of an untenured teacher."[21]

His remaining argument reasons that because the Faculty Handbook says the University's "wide latitude" will be "consistent with academic freedom and due process," Fourteenth Amendment due process was conferred on him.[22]

(Cont'd)

> Because all probationary contracts to the ranked faculty at Troy State University in Montgomery are made with the understanding that both the University and the appointee will engage in a period of mutual evaluation prior to establishing a continuous association, a severance prerogative rests with both parties.
>
> The term nonreappointment means that the University has decided not to renew appointment of a nontenured faculty member. A major responsibility of TSUM is to recruit and retain the best qualified faculty within its means; therefore, wide latitude, consistent with academic freedom and due process, is accorded the Dean and the Vice-President for Academic Affairs in meeting this responsibility.

21. *Abston v. Woodward*, 437 So. 2d 1261, 1264 (Ala. 1983). *See also Johnson v. Cain*, 430 F. Supp. 518, 519 (N.D. Ala. 1977) ("the plaintiff was not entitled to be given any reason for the nonrenewal of his contract, and was not entitled to a hearing on the action taken.").

22. The University's position is that it means compliance with the procedural steps for nonrenewal, which were without dispute followed. *Lovelace*, 793 F.2d at 1122 (provision for "justification" of recommendations for renewal or nonrenewal are not a relinquishment of the university's normal discretion but rather "simply proceduralized

(Cont'd)

The conclusive answer is the established principle that property interests protected by the due process clause cannot be created from procedural provisions. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985) is explicit on the subject:

> The point is straightforward: the Due Process Clause provides that certain substantive rights — life, liberty, and property — cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty.

So it is that here, as in *Bunger v. University of Oklahoma Board of Regents*, 95 F.3d 987, 990-991 (10th Cir. 1996), Boyett "attempts to construct a property interest out of procedural timber, an undertaking which the Supreme Court warned against in *Cleveland Board of Education v. Loudermill* . . . ." *See also Lovelace v. Southeastern Massachusetts University*, 793 F.2d 419, 422 (1st Cir. 1986) (by specifying criteria, "a university does not thereby set objective criteria, constricting its traditional discretion or transforming a largely judgmental decisional process into an automatic right to, or property interest in, tenure."); *Villanova v. Abrams*, 972 F.2d 792, 798 (7th Cir. 1992) ("the persistent fallacy that procedural requirements create substantive entitlements, although the Supreme Court and this court keep insisting they don't."); *Batra v. Board of Regents of University of Nebraska*, 79 F.3d 717, 720 (8th Cir.

(Cont'd)
the information gathering process . . . ."); *Colburn*, 973 F.2d at 589 ("A property interest is not established by general statements in handbooks, appointment documents or elsewhere that an employee will be judged on some criteria.").

1996) ("The University's alleged failure to follow its own procedural rules and regulations did not, without more, give rise to a protected liberty or property interest.").

The Eleventh Circuit was therefore standing on solid *Loudermill* precedent in rejecting Boyett's contention because he failed to establish a property right. App. 4a.

His effort to depart from this principle by relying on *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) takes him nowhere. It had odd facts, resulting in the observation by Justices Powell and Rehnquist that "this is a case that should be decided narrowly on its unusual facts." 455 U.S. at 443 (concurring opinion). Moreover, the plaintiff there had a constitutionally protected property interest, 455 U.S. at 430, while Boyett in contrast did not. His reliance on *Logan* thus begs the question.

CONCLUSION

Boyett has received ample analysis of his claims by the District Court and the Court of Appeals. His petition for still another round in the Supreme Court should be denied.

Respectfully submitted,

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